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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 No. CR 14-0196 CRB

18 UNITED STATES OF AMERICA, DEFENSE STATEMENT RE:  
19 Plaintiff,  
20 vs.  
21 KWOK CHEUNG CHOW,  
22 Defendant.

23 \_\_\_\_\_/

24 On behalf of Raymond Chow, and co-defendants similarly  
25 situated, the following is intended to notify the court as to  
26 discovery management and distribution issues, and to advise the  
27 court of foreseeable delays in defense preparation.  
28 Specifically, the court should be aware that there is a lack of  
any discernable organizational structure in the discovery files  
as delivered by the Government to defense counsel. This  
substantially impairs the ability to prepare defenses, conduct  
investigation, and evaluate the merits of pretrial motions. This  
will continue to cause unnecessary delay unless remedial  
measures are taken. In addition, counsel hereby notifies the

1 court of a preliminary indication that the FBI may be concealing  
 2 certain evidence from the United States Attorney. This is  
 3 evidenced by the lack of notice to the Government of apparent  
 4 drone surveillance on persons in Northern California in the  
 5 course of this investigation, without any disclosure whatsoever  
 6 of supporting documentation (i.e. 302s). Finally, discovery  
 7 distribution has not been entirely consistent with the Statement  
 8 Re: Discovery submitted by the Government and this serves to  
 9 supplement and clarify the record on behalf of defense.

10

11 1. A lack of organization in the millions of files turned over  
 12 in discovery substantially impairs both the ability to  
prepare defenses and evaluate the merit of potential  
pretrial motions.

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14 As this court is already aware, there is an enormous amount  
 15 of discovery as it pertains to 29 co-defendants and multiple  
 16 operations and investigations spanning back potentially a  
 17 decade. The court was proactive in assigning a discovery  
 18 coordinator to assist defendants in the organization and  
 19 indexing of data which could potentially remedy this issue to a  
 20 large extent.<sup>1</sup> However, due to distribution of discovery that  
 21 took place later than expected, the discovery coordinator  
 22 estimates indexing and organizing to be completed in December  
 23 2014.

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26 <sup>1</sup>Although with a large amount of data it is an invitation for  
 27 non-disclosure to task the opposing party with sole  
 responsibility to inventory discovery since the entity most  
 knowledgeable is the proponent.

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1       One probably cannot visualize the difficulty of finding  
 2 individual files with this volume unless tasked with it. It is  
 3 exponentially more work to find specific files than to transfer  
 4 them in bulk to someone else. To date, the total number of  
 5 computer files disclosed from the Government in this case  
 6 exceeds 7 million.<sup>2</sup> There are over 100,000 folders and  
 7 subfolders.<sup>3</sup> The scanned documents consist of 46 folders  
 8 containing 1,758 individual files.<sup>4</sup> Each of these files consist  
 9 of FBI 302s, affidavits, line sheets, phone intercepts  
 10 summaries, body wires summaries, and more<sup>5</sup>. Some document files  
 11 are less than a page while others are hundreds of pages. There  
 12 is little uniformity as to the file names and the system  
 13 utilized by the Government in organizing files is not readily  
 14 apparent. Perhaps the greatest and most time consuming  
 15 challenge arises with respect to audio files where they must be  
 16 located and listened to, and then defense staff sometimes has to  
 17 identify parties by sound of voice with little reference point  
 18 or guidance for whose voice is actually heard. Perhaps even  
 19 identify a party whose voice he or she has never heard before.

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20       <sup>2</sup>Confirmed through Microsoft Windows Explorer, hover mouse over  
 21 file, right click, select properties, and it will auto-count.  
 22 Many files are not discovery files but they still need to be  
 sifted through to determine they are not relevant.

23       <sup>3</sup>Same as footnote 1.

24       <sup>4</sup>Same as footnote 1.

25       <sup>5</sup>On advise of the discovery coordinator defense purchased a  
 26 commercial indexing program which has tremendously assisted in  
 27 key word searches throughout the discovery universe. However, it  
 does not assist with video or audio review, it occupies a  
 majority of computer resources while activated, and there is a  
 steep learning curve.

1       In early August 2014, the Government did provide an index  
2 of broad categories of discovery documents and audio video files  
3 grouped into specific Bates ranges. This was extremely helpful  
4 and appreciated. However, the Government only created 1,123  
5 separate categories which did not provide sufficient indexing  
6 for the millions of files. For example, one of the 1,123  
7 categories on their index identified "Bates 800001" as  
8 "Recorded phone calls and conversations, and video surveillance  
9 of meetings" but there is no reference as to what time frames,  
10 what part of this investigation, and/or what other files these  
11 recordings pertain to.

12       Similarly lacking is any indication of which of the  
13 multiple operations the file pertains to, which defendants are  
14 involved, or any other identifying information. For example,  
15 there are 3,165 total files of recordings in Bates 800001 alone,  
16 so if defense counsel is looking for a recorded phone call we  
17 are forced to manually rummage through more than 3,000 audio  
18 files until we find the appropriate recording based on what we  
19 hear. The problem is exponential in the event a recording  
20 cannot be found since that necessitates an even broader search  
21 and double checking. It is not uncommon to spend hours  
22 confirming the non-existence of a file before contacting the  
23 Government to find out it was inadvertently withheld.

24       Until the discovery is adequately organized, either through  
25 disclosure of the Government's internal organization structure  
26 or by the discovery coordinator's completion of an index, the  
27 defendants run the risk of falling below Constitutional minimum

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1 guarantees through excessive and unnecessary delay to say the  
 2 least.

3

4 2. Preliminary evidence suggests that the FBI is withholding  
discovery from the US Attorneys in this case.

5 Especially recently, the US Attorneys on this case seem to  
 6 have been working diligently to communicate quickly and  
 7 effectuate the exchange of discovery as rapidly as possible and  
 8 it is greatly appreciated. As communicated multiple times, the  
 9 AUSA's intend to disclose more than what they feel is required  
 10 to assist in defense preparation. There are indicators,  
 11 however, that the FBI is withholding evidence from the US  
 12 Attorney's Office and this statement serves only to bring the  
 13 issue to the court's attention as this will likely be the  
 14 subject of future motions.

15 Here, one unmarked orphan file in the 7 million plus total  
 16 files disclosed was footage of what appears to be a drone<sup>6</sup>, or  
 17 unmanned aerial vehicle, surveilling a local family which was  
 18 under investigation and eventually arrested in events related to  
 19 this case. The drone surveillance video accompanied discovery

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21 <sup>6</sup>Counsel has no experience with drones or UAVs. The opinion  
 22 that it is drone footage is based on the fact it was circling  
 23 approximately 650' above the ground. It circled the target home  
 24 for more than an hour of which its altitude never appeared to  
 25 deviate significantly. It was hovering in the air above a  
 26 residential neighborhood above a cul-de-sac with little traffic  
 27 other than target vehicles, during broad daylight, did not seem  
 to alert people below, had camera capabilities to zoom in  
 extremely close on front porches, license plates, on various  
 objects on the ground, and had a GPS target location specified  
 on the screen. No voices were heard and no human involvement was  
 observed at any point. The footage is from June 2012.

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1 but was not Bates-stamped as required by the Protective Order.  
2 Despite the fact that the FBI documented even the most mundane  
3 activity against this particular defendant and his family over  
4 the course of a year, including installation and removal of a  
5 closed-circuit video device across the street from a residence,  
6 there appears to be no mention of drone or aerial surveillance  
7 anywhere in any document provided thus far. The Government  
8 makes no mention of having disclosed, or intending to disclose,  
9 footage of drone surveillance or related documentation in its  
10 Statement of Discovery. One inference is that the AUSA's are  
11 aware of the drone surveillance and that they disclosed the  
12 footage accordingly and that failure to provide an accompanying  
13 302 was an oversight. Another inference is that the FBI  
14 attempted to delete all drone footage files prior to  
15 transferring the discovery to the prosecution team but neglected  
16 to delete the last video in a month long series. Something does  
17 not add up and one potential explanation is that the FBI is  
18 withholding information from the US Attorney.

19 With no actual court supervision over the universe of the  
20 FBI discovery as a whole, defense counsel is forced to  
21 hypothesize as to why various things have not been disclosed,  
22 and in some instances we must speculate as to the general  
23 existence of such in the first place. There is reason to  
24 believe far more drone footage exists than what was disclosed  
25 and the potential that many, if not all, persons investigated  
26 were surveilled through drones is a probability.

27 Curiously, the drone footage was not Bates-numbered so it  
28

1 is not even protected material which makes it more likely that  
 2 the AUSA's were not aware of the footage as they would have  
 3 likely wanted it to fall within the protective order. Drone  
 4 surveillance is pertinent to many defendants because aerial  
 5 surveillance happened during a time in this investigation where  
 6 the FBI was either applying for or attempting to maintain the  
 7 court's permission for electronic surveillance on one or more of  
 8 the defendants' telephones or vehicles. It does not appear to be  
 9 addressed by the Government applicants when demonstrating  
 10 requisite necessity at any time. AUSA's were always involved in  
 11 the application process and it is unlikely they would not  
 12 disclose a relevant fact such as the ability to conduct unmanned  
 13 aerial surveillance.

14 Another indication that the FBI is withholding information  
 15 from the US Attorney is evident in what is currently understood  
 16 to be the first wiretap application in this case, applied for in  
 17 December of 2011. The agent's affidavit states in part:

18  
 19 **Multiple court orders have been issued authorizing  
   the installation and use of pen register and trap  
   and trace devices on telephones used by the Target  
   Subjects and Interceptees.** Agents have also  
 20 obtained toll records for these telephones.  
 21 Analysis of these records and data show several  
 22 communications between CHOW and his associates  
 23 confirming that many of the Target Subjects and  
 24 Interceptees appear to communicate with each other  
 25 over the telephones. Additionally **cell site data  
   from pen register trap/trace orders have allowed  
   agents to approximate the location of subjects of  
   this investigation therefore providing agents a  
   general idea of the physical whereabouts of the**

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 27  
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1           **Target Subjects and Intercept...<sup>78</sup>[emphasis added]**

2           This raises concerns for many reasons. First, despite an  
 3 assurance from the prosecution to disclose such, no discovery  
 4 exists reflecting court authorization to monitor the subjects  
 5 and interceptees which indicates illegal surveillance was  
 6 conducted in this investigation as evidenced in part by the FBI  
 7 agent's declaration under penalty of perjury that "multiple  
 8 court orders" had been obtained. Second, if an order did in  
 9 fact exist, it has not been provided to defense counsel in  
 10 discovery despite assurances all such items would be provided;  
 11 thus, this would raise a concern about accountability to ensure  
 12 disclosure as promised. Third, when defense counsel inquired  
 13 with the US Attorney on the whereabouts of the court orders  
 14 referenced by both FBI Agents Pascua and Vanderporten in the  
 15 January and April 2012 affidavits, the Government had no  
 16 explanation and inquired with the case agents. This is  
 17 concerning because it raises an issue Mr. Chow is adamant about.  
 18 Specifically, he believes his phone communications have been  
 19 monitored and that the FBI is withholding recordings from  
 20 discovery because they were exculpatory. Because defense is  
 21 without confirmation that the information exists or not it would  
 22 be difficult to compel. The potential for an undisclosed  
 23 interception in the context of this investigation is starting to  
 24 look like a reality based on what has been observed so far.

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 26           <sup>7</sup>Bates 400001, Page 72, Paragraph 286.

27           <sup>8</sup>Bates 400126, page 63,Paragraph 149.

1       If the FBI's theory of criminality about Mr. Chow is to be  
2 believed at all, the lack of a wiretap or audio recording device  
3 on Chow is beyond improbable. With Chow's past reputation and  
4 criminal record carrying the weight of wiretap applications for  
5 people whom he hardly met, who were by the FBI's own admission  
6 from an unrelated investigation, an application of any type  
7 would have been approved to monitor Chow's cell phone or the  
8 Chinese Free Mason's phone line would have been a slam dunk. Of  
9 all things, the FBI's narrative here illustrates the need for  
10 critical oversight and unencumbered Due Process regarding  
11 discovery. This is especially so with what the FBI claims does  
12 not exist.

13       According to the FBI they were surveilling Chow since 2006,  
14 they supposedly "infiltrated" his "criminal organization" the  
15 Chinese Freemasons, yet the FBI found not one crime from 2006 to  
16 2010; until UCE 4599 worked tirelessly to convince a young co-  
17 defendant to launder FBI money in partnership with the UCE who  
18 was supposed to have been posing as a La Cosa Nostra crime boss.  
19 The agent's mafia front was apparently supposed to be obvious to  
20 everyone despite the uncontested fact that for years he held  
21 himself out as an investment manager, private wealth manager,  
22 future restaurateurs, who was passionate about fine food and  
23 wine, and interested in investing in a high end restaurant in  
24 San Francisco. Furthermore, the agent went by a protestant  
25 name, spoke like a well educated person, wore traditional  
26 conservative business attire, and the agents posing as his  
27 business partners and close friends were not acting like

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1 mafiosos, but instead one was an African-American real estate  
 2 developer and the other a Chinese-American import-exporter of  
 3 goods.

4       Beyond that, what has been turned over in discovery is  
 5 shocking to the extent the agents either misrepresented facts  
 6 and even recorded conversations, or attested under penalty of  
 7 perjury to statements which they, in fact, did not have  
 8 knowledge. Attorneys for both sides in this case should look at  
 9 the FBI's narrative with healthy skepticism when evaluating  
 10 discovery, especially in the context of what is stated by the  
 11 FBI not to exist. The lack of credibility of primary FBI agents  
 12 in this case has been, and will to a greater extent in the  
 13 future, raised with sufficient supporting evidence to, at a  
 14 minimum, warrant the court providing recommendations to assist  
 15 in monitoring the universe of discovery.

16       Potentially this Court would entertain the idea of having  
 17 the Government designate a specific supervisory FBI agent who  
 18 would be present at pretrial conferences and motion hearings as  
 19 a resource and to ensure accountability throughout the  
 20 prosecution of all defendants in this case. Furthermore,  
 21 defense requests some type of a system or log identifying in  
 22 general terms what discovery is to be expected, when it should  
 23 be expected, and what is entailed so that we can budget time and  
 24 resources proactively to provide swift adjudication.

25

26 3. The Government's Statement of Discovery requires  
clarification.

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1       The Statement of Discovery filed by the United States has  
 2 the potential of being interpreted in a way to suggest that  
 3 discovery exchange has been timely and without obstacle.  
 4 Ironically, prior to reading the Statement of Discovery, Chow's  
 5 defense team was fairly satisfied with the progress in discovery  
 6 with a few exceptions which will necessitate litigation, but  
 7 understandably so. However, a comparison of the Government's  
 8 position in informal discovery negotiations from August to  
 9 present, and their Statement of Discovery recently submitted,  
 10 raises the necessity to clarify the record for the court. This  
 11 is not a complaint but only serves to make the court aware there  
 12 is an additional perspective which may be relevant in future  
 13 scheduling and motions to compel.

14       Below are specific categories mentioned in the Government's  
 15 statement (in bold), but which should be clarified:

16

17       **Photographs:** No photographs whatsoever have been turned  
 18 over regarding Chow, the CKT, Alicia Lo, the  
 19 investigation and search subsequent arrest, or any  
 20 other photo of Chow or the CKT related to this  
 21 investigation. No photographs have been turned over  
 22 that are *not* related to co-defendant Mei that defense  
 23 counsel is aware. The Government has promised to turn  
 24 them over but has yet to identify the nature of the  
 25 photos, estimated quantity, or when they should be  
 26 expected.

27

**Jail calls:** Chow's counsel has received no jail call  
 28 recordings although they have been requested through  
 incorporation of informal discovery requests on at  
 least two occasions.

29

**A-files for non-citizen defendants:** Government has  
 30 agreed to provide Chow's A-file but has not provided  
 31 the file nor have they provided any date in which it  
 32 can be expected. Chow's A-File possesses critical  
 33 information regarding Chow's circumstances which are  
 34 relevant to his defense.

35

1           **Records related to local law enforcement investigations**  
 2           **and arrests:** There is at least one investigation of  
 3           Chow that the Government has refused to disclose  
 4           without citing a basis despite less relevant  
 5           investigation records being turned over. The matter  
 6           involves the Government's implication that Chow  
 7           committed a serious crime but one that he was quickly  
 8           exonerated of. This will be the subject of an upcoming  
 9           motion to compel.

10          **Transcripts of summary translations:** These were  
 11        incomplete and brought to the attention of the  
 12        Government by multiple defendants' attorneys. The  
 13        Government was made aware approximately two weeks ago  
 14        and the remaining transcripts have not been turned  
 15        over. Defense is not aware of the Government's time  
 16        frame or the volume of records to expect.

17          **Business Documents:** CKT and Chow Enterprises, LLC.,  
 18        documentation has been requested and not received.  
 19        Status is uncertain and will be addressed in a motion  
 20        to compel. The same goes for financial records.

21          **Pen Registers and Orders:** Not produced in their  
 22        entirety as discussed above.

23          **Search warrant documentation:** All search warrant  
 24        documentation regarding Chow or his associated  
 25        residences was initially not provided to defense. This  
 26        was brought to the Government's attention approximately  
 27        one month ago and was partially remedied approximately  
 28        two weeks later. However, the only documentation  
 29        provided was relevant to the application and order but  
 30        not to inventories as to what was seized, photographs,  
 31        etc. Those are still outstanding and no time frame has  
 32        been provided by the Government.

33          **Unindicted Parties:** The Government states "...because  
 34        some of the descriptions of the discovery materials  
 35        relates to individuals not currently charged or not  
 36        charged publicly and/or relates to discovery that may  
 37        only be discoverable to particular defendants but not  
 38        to other co-defendants . . ." they will submit to an  
 39        in camera hearing. Although these may or may not be  
 40        addressing Chow's requests, it should be noted that  
 41        defense counsel has informally requested on three  
 42        occasions information related to unindicted parties,  
 43        communications between specific DOJ employees and  
 44        unindicted parties, and other information related to  
 45        the decision not to charge these persons. The  
 46        Government ignored the first two requests and  
 47        officially refused to disclose any information as of  
 48        two weeks ago. A motion to dismiss, and in the

1 alternative, a motion to compel discovery for selective  
2 prosecution will be filed as soon as defense resources  
3 permit.

4 In conclusion, Mr. Chow and counsel respect that the  
5 Government has an enormous task in facilitating discovery. For  
6 the most part the AUSA's, with few exceptions, have appeared to  
7 be diligent about their efforts to get complete this task.  
8 However, due to the massive nature of this discovery transfer,  
9 the failure to organize the discovery in advance, and the  
10 potential for a lack of accountability regarding what the FBI  
11 turns over, significant scheduling delays are foreseeable.  
12 Defendant's Constitutional rights are fundamentally effected by  
13 all byproducts of the method in which discovery is handled in  
14 this case presently.

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16  
17 /s/ CURTIS L. BRIGGS  
18 CURTIS L. BRIGGS  
19 Attorney for Defendant  
20 KWOK CHEUNG CHOW  
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